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AB 1302 (Jerome Horton) – Emergency Regulations Changes in the APA Effective 1/1/07

Overview: AB 1302 amended the Administrative Procedure Act (APA) to enact the first comprehensive changes in the adoption of emergency regulations since the 1980s. These changes will affect only those emergency regulations initially filed on or after January 1, 2007. Any emergency regulation that is in effect on 12/31/06 will continue to be subject to the 2006 version of the APA, even upon subsequent readoptions. The most significant AB 1302 changes fall into three categories: 1) changes in time limits, 2) changes in notice requirements, and 3) changes in how to show that emergency regulations are justified.

Timing Changes: AB 1302 increases the initial effective period of an emergency regulation from 120 days to 180 days. 120 days has repeatedly proven to be inadequate to complete regular rulemaking on any but the simplest files. Increasing the initial effective period to 180 days will make it easier for agencies to make their emergency rules permanent without requiring a readoption.

AB 1302 permits no more than two readoptions of emergency regulations, each for a period of 90 days. Under current law there is no specific limit on how many times an emergency regulation may be readopted. Also, readoption will only be permitted "if the agency has made substantial progress and proceeded with diligence" to adopt the regulation on a permanent basis.

These two changes, taken together mean that emergency regulations cannot be in effect for more than 360 days. This is approximately equal to the one-year that the APA provides for the adoption of permanent regulations. Under the new law, therefore, agencies that want to make their emergency regulations permanent should begin working to adopt the permanent rules as soon as they adopt the emergency. Agencies will no longer be able to enact emergency regulations and then wait months before beginning the process of adopting the permanent regulations.

Notice Changes: With limited exceptions, agencies adopting emergency regulations are required by AB 1302 to notify the public 5 working days before submitting the regulations to the Office of Administrative Law (OAL). This is a requirement that has been imposed on the California Department of Insurance since 1993. It will now be imposed upon all state agencies. Notice will be provided by mailing the finding of emergency and the proposed text to all people who have requested notice of rulemaking pursuant to Gov. Code § 11346.4(a)(1).

The advance notice requirement does not apply to emergency regulations filed by the Department of Corrections and Rehabilitation pursuant to Penal Code § 5058.3. It also does not apply to emergency regulations "if the emergency situation clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest." OAL is considering adopting regulations to define more precisely when this exemption will be permitted. Unless and until such regulations are adopted, decisions on permitting this exemption will be made by OAL on a case-by-case basis. Agencies that want to file emergency regulations without providing advance notice pursuant to the "inconsistent with the public interest" exemption should contact OAL in advance to discuss the matter.

The other major notice provisions are applicable only to OAL. AB 1302 requires OAL to post copies of all emergency files it receives on its internet web site. It also requires OAL to wait five calendar days after receiving an emergency regulation for public comment. This comment period may be waived pursuant to the same "inconsistent with the public interest" standard applicable to the advance notice requirement.

Justification of Emergency Regulations: AB 1302 changed what an agency must show to justify emergency regulations. Most of the changes clarify or specify requirements that were previously implied in the statute. There are, however, some significant substantive changes. For example, when an agency has known of the situation that is said to justify the emergency regulation for long enough to have adopted regular regulations instead, it will be required, in the finding of emergency, to explain why it did not do so. There is no standard regarding what constitutes an adequate explanation; that judgment is left up to the agency. However, failure to offer any explanation could result in disapproval of the emergency regulation.

The new law clarifies that a finding of emergency must demonstrate, by substantial evidence, that the emergency regulation is needed and requires the agency to identify technical studies it relied upon in drafting the regulation. It specifies that a showing of convenience, general public need, expediency, etc., will not, by itself, be adequate to justify emergency regulations.

Most of these changes just clarify or expand upon principles that already govern emergency regulations. Taken together they clarify that emergency regulations are to be reserved for cases in which serious avoidable harm will certainly occur unless the regulation is adopted immediately. OAL sees many emergency regulations in which the justification is some form of the argument that "these regulations do good things and if they are not adopted as emergency regulations those good things will be delayed." The changes adopted by AB 1302 clarify that this isn't good enough. Emergency regulations are to be reserved for emergencies.

Further Information: Further questions about AB 1302 should be directed to the OAL Reference Attorney at (916) 323-6815 or staff@oal.ca.gov.